

SEP 07 2004

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:	Max Aebi <i>et al.</i>	Confirmation No.	7179
Serial No.	09/879,911	Art Unit:	3731
Filed:	June 14, 2001	Examiner:	Reip, David Owen
For:	SPINAL DISC SPACE DISTRACTOR	Attorney Docket:	008932-471-999

RESPONSE TO SPECIES REQUIREMENT

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

In response to the outstanding Office Actions dated May 5, 2004 and June 28, 2004 in which the Examiner imposed a species requirement, please consider the following remarks.

Petition for Extension of Time under 37 CFR 1.136.

It is respectfully requested that the time for response to the Office Action dated May 5, 2004 and June 28, 2004 be extended for a period of two months(s) from July 28, 2004 to September 28, 2004. It is respectfully submitted that the appropriate extension of time should be governed by the Office Action dated June 28, 2004, and not the Office Action dated May 5, 2004 as suggested by the Examiner. It is respectfully submitted that the Applicant's response dated June 3, 2004 was responsive to the Office Action dated May 5, 2004, and although the Examiner may not agree with the Applicant's assertion that claims 1-35 are readable on the elected species, that does not make the Applicant's election non-responsive. Thus, it is respectfully submitted that a two-month extension of time is required.

Alternatively, if the Examiner does not agree with the Applicant's assertion that the appropriate extension of time should be governed by the Office Action dated June 28, 2004, then it is respectfully requested that the time for response to the Office Action dated May 5, 2004 be extended for a period of three months(s) from June 5, 2004 to September 5, 2004.

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Species Requirement

In the Office Action dated May 5, 2004, the Examiner indicated that the present application contains claims directed to more than one species and thus requires an election under 35 U.S.C. 121 of one of the following species of the claimed invention:

- I. Species 1, Figs. 1-3 and 6-9
- II. Species 2, Fig. 10
- III. Species 3, Fig. 11
- IV. Species 4, Figs. 12 and 13
- V. Species 5, Figs. 14-16.

In response to the species election, Applicant provisionally elects the invention of Species 5 - as depicted in Figs. 14-16 - drawn to a spinal disc distractor - for prosecution in this application. Applicant reserves the right to file divisional applications to protect the inventions of Species 1-4. Applicant provisionally elects Species 5 with the understanding that the claims shall be restricted to this species only if no claim finally held to be allowable is held generic. Applicant believes that pending claims 1-4, 6, 17, 18, 20, 21, 22, 26, and 30-35 are readable on the elected Species.

The election of Species 5 and the temporary withdrawal of claims not readable thereon pending the allowance of a generic claim, is not to be interpreted as an admission as Applicant still believes that the introduction of Figure 8A is not new matter.

Reconsideration and allowance of the present application in view of the above remarks is respectfully requested. The Examiner is respectfully requested to reconsider this application with a view towards allowance. The Examiner is invited to call the undersigned attorney at 212-326-7883, if a telephone call could help resolve any remaining issues.

Date: September 7, 2004

Respectfully submitted,


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